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CITATIONS.

Cases—Continued.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

EDWIN DENBY, SECRETARY OF THE Navy of the United States of America, plaintiff in error,
v.
GEORGE A. BERRY.
No. 392.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to the Court of Appeals of the District of Columbia to review its judgment in a mandamus proceeding instituted by one George A. Berry, defendant in error, against the Secretary of the Navy. By the judgment of the trial court it was ordered that a writ of mandamus be issued, directed to the Secretary of the Navy, commanding him—

1st. To revoke and rescind an order issued by him November 12, 1919; and

2d. To permit the defendant in error to appear before, and to refer his case to, a naval retiring board

in order that it might inquire into and determine the facts touching the nature and occasion of his disability (R. 46).

The order which the Secretary is required to revoke and rescind was issued by him over his official signature in the form of an indorsement on the report of a board of medical survey (which had recommended that the defendant in error be ordered before a naval retiring board) which order for the convenience of the court is herein designated by us as "Order A" and read as follows.

[Order A.]

> The recommendation of the board of medical survey in this case is not approved. In accordance with the recommendation of the Surgeon General, as set forth in the third indorsement, it is directed that this officer be ordered to proceed to his home and be released from active duty. (R. 35, 36.)

We are not now concerned with the second command of the proposed writ, because of the decision of the Court of Appeals (279 Fed. 317), which held:

> The court below went too far in directing the Secretary of the Navy to accord plaintiff a hearing before a retiring board. It is, therefore, ordered that the judgment be modified to that extent, and that as so modified it be affirmed with costs. (R. 51.)

The facts of the case are:

The defendant in error enrolled in the Naval Reserve Force (R. 32) for a term of four years in

accordance with an Act of Congress approved August 29, 1916 (39 Stat. 587), which Act created the Naval Reserve Force and provided that—

> The Naval Reserve Force shall be composed of citizens of the United States who, by enrolling under regulations prescribed by the Secretary of the Navy or by transfer thereto as in this Act provided, obligate themselves to serve in the Navy in time of war or during the existence of a national emergency, declared by the President * * *.
>
> Enrollment and reenrollment shall be for terms of four years * * *.

He was assigned the provisional rank of Lieutenant Commander in the Naval Reserve Force (R. 32) in accordance with the same statute, which provided that—

> When first enrolled members of the Naval Reserve Force, except those in the Fleet Naval Reserve, shall be given a provisional grade, rank or rating in accordance with their qualifications determined by examination.

He was employed on active duty in the Navy in accordance with the following provisions in the aforesaid Act of August 29, 1916:

> Members of the Naval Reserve Force may be ordered into active service in the Navy by the President in time of war or when, in his opinion, a national emergency exists. (39 Stat. 587.)
>
> Enrolled members of the Naval Reserve Force may, in time of war or national emergency, be required to perform active

> service in the Navy throughout the war or until the national emergency ceases to exist. (39 Stat. 588–589.)

While on active duty he was examined by a Board of Medical Survey at the Naval Hospital, Washington, D. C., October 14, 1919, which reported him unfit for duty and recommended that he be ordered before a naval retiring board. (R. 33.)

The report of the board was transmitted to the Bureau of Medicine and Surgery of the Navy Department for recommendation in accordance with the following regulation:

> Reports of medical surveys upon officers and enlisted men of the Navy shall be made in triplicate (through the commanding officer under whom the person surveyed is serving) to the officer ordering the survey, by whom they shall be acted on and transmitted direct to the Bureau of Medicine and Surgery for recommendation and further transmission to the Bureau of Navigation for final action. (Art. 363, Navy Regs. 1913.)

The chief of the Bureau November 11, 1919 (R. 33) disapproved the recommendation of the board (that defendant in error be ordered before a naval retiring board), and on November 12, 1919, the Secretary of the Navy forwarded the report of the board to the Bureau of Navigation, Navy Department, with the following indorsement thereon over his official signature as Secretary of the Navy (R. 35):

> [Order A.]
>
> The recommendation of the Board of Medical Survey in this case is not approved. In

> accordance with the recommendation of the Surgeon General, as set forth in the third indorsement, it is directed that this officer be ordered to proceed to his home and be *released* from *active* duty. (Italics ours.)

On November 14, 1919, the Bureau of Navigation addressed the following communication to the defendant in error (designated by us as Order B) informing him of the action which had been taken in his case (R. 39):

[Order B.]

> Having been found physically unfit for *active* duty in the United States Naval Reserve Force by the Board of Medical Survey before which you appeared on October 14, 1919, the Secretary of the Navy has directed that you be ordered to your home and be *released* from all *active* duty. (Italics ours.)

Pursuant to the Secretary's order of November 12, 1919 (Order A), the Bureau of Navigation on November 17, 1919, addressed the following order (R. 39) to the defendant in error (designated by us as Order C):

[Order C.]

> You are hereby detached from such duty as may have been assigned you; will proceed to your home and regard yourself honorably discharged from *active* service in the Navy. (Italics ours.)

When the foregoing orders were issued by the Secretary of the Navy and by the Bureau of Naviga-

tion there was then in effect a regulation issued by the Secretary of the Navy pursuant to section 161 of the Revised Statutes (R. 36), which regulation provided that—

> An official appeal from an order or decision of the Secretary of the Navy by an officer shall be addressed to the President as the common superior and be forwarded through the Department except in case of refusal or failure to forward, when it may be addressed directly. Similarly, an appeal from an order or decision of an immediate superior shall be addressed to the next highest common superior who has power to act in the matter, and shall be forwarded through the immediate superior, or, should the latter refuse or fail to forward it within a reasonable time, it may be forwarded direct with an explanation of such course. (Art. 5323, Naval Instructions, 1913.)

The Secretary of the Navy has received no appeal from the defendant in error to be forwarded to the President, nor has he refused to forward any such appeal. (R. 36.) On the contrary, ignoring the remedy provided by the foregoing regulation, he carried his military grievance to a civil court and, on November 18, 1919 (R. 1), filed in the Supreme Court of the District of Columbia his petition for mandamus against the Secretary of the Navy, praying (R. 4) that the Secretary of the Navy revoke and cancel the order of November 17, 1919 (Order C), issued by the chief of the Bureau of Navigation, who was not even made a party to the proceedings.

On February 27, 1920 (R. 5), the defendant in error, under leave to amend, filed an entirely new petition for mandamus against the Secretary of the Navy, wherein he prayed (R. 9) "that the defendant revoke and cancel the order referred to in paragraph 13 hereof"—that is, the letter (Order B) addressed by the chief of the Bureau of Navigation to the defendant in error on November 14, 1919, hereinbefore quoted, which was not the order ("C") that he sought to have canceled by his original petition.

The case, having been heard on demurrer to the Secretary's answer, judgment was rendered (R. 46), which judgment, as modified by the Court of Appeals (R. 51), requires that a writ of mandamus be issued directed to the Secretary of the Navy "commanding him to revoke and rescind his order of date of November 12, 1919, referred to in paragraph 8 of his said answer herein"—that is, Order "A." This order was issued by the Secretary of the Navy to the chief of the Bureau of Navigation directing that defendant in error be released from active duty, the revocation of which Order "A" was not prayed by the defendant in error in either his original or amended petition. In other words, in his original petition defendant in error sought to have canceled Order C; in his amended petition he sought to have canceled Order B; and the court directed the cancellation of Order A.

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ASSIGNMENTS OF ERROR.

The court erred as follows:

1. In holding that the demurrer to the answer of the respondent filed in the above-entitled cause should be sustained.

2. In not holding that the said demurrer to said answer of the respondent should be overruled, and the petition of the appellee—defendant in error—dismissed.

3. In affirming the judgment of the Supreme Court of the District of Columbia, awarding a writ of mandamus commanding the appellant—plaintiff in error—to revoke and rescind his order of date November 12, 1919, referred to in paragraph 8 of said answer.

4. In holding that in the matter of retirement, officers of the Naval Reserve Force are entitled by law to all the rights of officers of the regular Navy.

5. In holding that appellee—defendant in error—having been found by a board of medical survey to have sustained his disabilities in line of duty, becomes entitled to avail himself of the provisions of section 1455, Revised Statutes of the United States, as follows: "No officer of the Navy shall be retired from active service, or wholly retired from the service, without a full and fair hearing before such Naval Retiring Board, if he shall demand it."

6. In holding that appellee—defendant in error—has placed himself within the full protection of said section 1455 of the Revised Statutes of the United States by communicating a request to the Secretary

of the Navy to be permitted to appear before a Naval Retiring Board.

7. In holding that the order of the Secretary of the Navy directing that the appellee—defendant in error—be placed on inactive duty, and the order of the Bureau of Navigation of the Navy Department made in pursuance thereof releasing him from said active duty, are void and without authority of law.

8. In holding that mandamus will lie to compel the vacation of the orders mentioned in the preceding assignment of error.

9. In holding that the vacation of the aforementioned orders will operate to reinstate appellee to his full standing as a Naval Reserve officer.

10. In holding that, should the President, believing the appellee—defendant in error—not to be incapacitated, refuse to direct that he be given a hearing before a Naval Retiring Board, said appellee—defendant in error—will still remain in the service, from which he can not be removed until a hearing is accorded him.

11. In not holding that the appellant—plaintiff in error—is authorized under existing law, in his discretion, to release appellee—defendant in error—from active duty in the Naval Reserve Force and to transfer him to an inactive-duty status in said Naval Reserve Force.

The substance of the matters thus presented is for convenience expressed in the propositions hereinafter argued.

ARGUMENT.

POINT ONE.

An appeal to the President is the remedy of a naval officer who considers himself aggrieved by an order issued to him by the Secretary of the Navy. Where the officer does not avail himself of that remedy, but appeals to the courts for a writ of mandamus commanding the Secretary of the Navy to revoke and rescind a military order, the courts are without jurisdiction to grant such relief.

The importance of this case lies in the fact that a court has for the first time in the history of this country assumed jurisdiction to review a military order issued by the Secretary of the Navy to one of his subordinates in the military service and to direct that such order be revoked and rescinded.

Unless the judgment be reversed a precedent will be established which will be destructive of discipline, and, if generally followed, would go far to transfer the supreme command of the armed forces from the Executive to the judicial branch of the Government.

The order in this case did not differ from thousands of other orders issued at the same period in the course of demobilization after cessation of hostilities in the late war, releasing from duty in the armed forces of the United States those who had entered the service during the period of the war and whose services on active duty in the Navy were no longer required. If the courts have jurisdiction to review the order issued in this case, they must have jurisdiction to review any

and all orders issued to persons in the military service by their lawful superiors whenever the one to whom the order is issued shall consider himself aggrieved thereby; and thus this court will have the impossible burden placed upon it of having its time consumed in passing upon the legality of military orders, a situation palpably inconsistent with the very theory and practice of civil and military law. In *Reaves* v. *Ainsworth*, 219 U. S. 296, 306, the leading case on the subject, an officer of the Army sought judicial annulment of an order, issued by a subordinate officer of the War Department pursuant to an order of the Secretary of War. The order in that case discharged from the Army an officer who claimed to be entitled to retirement on account of physical disability. Mr. Justice McKenna, delivering the unanimous opinion of this court, used the following strong and convincing language:

> The courts are not the only instrumentalities of government. They can not command or regulate the Army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the Army. * * * If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there

> litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined.

In the cases of *French* v. *Weeks*, 259 U. S. 326, and *Creary* v. *Weeks*, 259 U. S. 336, judicial relief by writ of mandamus was sought by officers of the Army against the Secretary of War to annul orders which were issued by the latter, in one case retiring the relator and in the other discharging him from the Army. In both cases it was held by this court that "the Supreme Court did not have jurisdiction to order the writ of mandamus prayed for." (Id. 336, 344.) In both cases this court cited with approval *Reaves* v. *Ainsworth*, *supra*. In the *French case*, this court also quoted with approval the following extract from *Dynes* v. *Hoover*, 20 How. 65, 82:

> If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts.

In the *Creary case*, this court said:

> It is difficult to imagine any process of government more distinctively administrative in its nature and less adapted to be dealt with by the processes of civil courts than the

> classification and reduction in number of the officers of the Army, provided for in section 24b. In its nature it belongs to the executive and not to the judicial branch of the Government.

The application to the present case of the remarks last quoted is emphasized by the fact that here, as in that case, there was a statute requiring the reduction in number of officers on active duty. The enactment referred to was contained in the naval appropriation act of July 11, 1919 (41 Stat. 138), which in an effort to hasten demobilization of wartime personnel, provided, among other things, that—

> The average number of commissioned officers of the line, permanent, temporary, *and reserves on active duty*, shall not exceed during the periods aforesaid, 4 per centum of the total temporary authorized enlisted strength of the Regular and Temporary Navy, and members of the Naval Reserve Force in enlisted ratings on active duty.

Other provisions in said act intended to limit the employment of reservists on active duty included the following:

> That during the fiscal year ending June 30, 1920, no member of the Naval Reserve Force shall be recalled to active duty for training or any other purpose except as hereinbefore provided. * * *
>
> Members of the Naval Reserve Force shall not hereafter be ordered to perform active duty on shore of a kind which is ordinarily performed by civilians, and all reservists now

> performing such duty shall be relieved from such duty within thirty days after the date of approval of this Act.

The opinion in *Marbury* v. *Madison*, 1 Cranch, 137, 166, contains the following noted passages:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. * * * The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable.

To what head of a department could this language more certainly apply than to the Secretary of the Navy when acting for the President as the constitutional Commander in Chief of the Army and Navy in the issuance of orders to his military subordinates? "The Secretary of the Navy represents the President,

and exercises his power on the subjects confided to his department." (*U. S.* v. *Jones*, 18 How. 92.) "The Secretary of War"—and the same is equally true of the Secretary of the Navy—"no matter what powers he may in fact exercise in such matters, is the representative and agent of the President, whose will is executed. As was said of the duties of the Secretary of State, under analogous circumstances, in *Marbury* v. *Madison*, 'He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.'" (*Brown* v. *Root*, 18 App. D. C. 239; see also *Decatur* v. *Paulding*, 14 Pet. 497.)

Applying to the present case the language of this court in *Reaves* v. *Ainsworth*, supra, the law never intended to give the defendant in error the right to carry his contentions over the head of the President to the courts, there to be litigated through a course of years. The Navy regulation hereinbefore quoted (supra, p. 6) provides for appeals to the President from orders or decisions of the Secretary of the Navy. This right of appeal to the President has been an established practice in the Navy from a very early date. Thus by Navy Department General Order No. 178 issued by the Secretary of the Navy under date of August 5, 1872, it was provided:

> Any official question of, or appeal from, any order or action of the department, by any officer of the Navy, should be addressed to the President, as the common superior, and should be forwarded through the depart-

> ment, except in cases of refusal or failure to forward, when they may be addressed directly.

This general order was in force on June 22, 1874, when the President approved the Revised Statutes of the United States, section 1547 of which reads as follows:

> The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner.

The orders and regulations which were in force when the Revised Statutes were approved by the President were thereby given the force of law. (*Ex parte Reed*, 100 U. S. 13, 22.) The above-quoted general order, with slight modifications in language, was embodied in the successive editions of the Navy Regulations, until it appeared in the Naval Instructions of 1913, in the form hereinbefore quoted (supra, p. 6).

It has been repeatedly decided that where by the regulations of a department an appeal is provided from the decision of a subordinate official, such remedy must be exhausted before an appeal to the courts. (*Lochren* v. *Long*, 6 App. D. C. 486, 506; see also *Hitchcock* v. *Bigboy*, 22 App. D. C. 275; *Brown* v. *Spelman*, 255 Fed. 863; *Women's Catholic Order of Foresters* v. *People ex rel. Minnie Keefe*, 59 Ill. App. 390; *Scammon* v. *American Gas Co.*, 160 Pac. 316.)

POINT TWO.

The order of the Secretary of the Navy did not operate to retire the defendant in error or to discharge him from the Naval Reserve Force and did not deprive him of any eligibility for retirement that he otherwise would have had.

The court below held that the Secretary's order of November 12, 1919 (Order A, supra, p. 2), operated to retire the defendant in error from active service, without a hearing before a retiring board, and was therefore illegal and in violation of section 1455 of the Revised Statutes, which section, in the opinion of the court, was extended to this case by an act approved June 4, 1920, more than six months after the aforesaid order was issued. These enactments are as follows:

> SEC. 1455. No officer of the Navy shall be retired from active service, or wholly retired from the service, without a full and fair hearing before such naval retiring board, if he shall demand it, except in cases where he may be retired by the President at his own request, or on account of age or length of service, or on account of his failure to be recommended by an examining board for promotion.
>
> Act of June 4, 1920, 41 Stat. 834: That all officers of the Naval Reserve Force and temporary officers of the Navy who have heretofore incurred or may hereafter incur physical disability in line of duty shall be eligible for retirement under the same conditions as now provided by law for officers of the Regular Navy who have incurred physical disability in line of duty.

Defendant in error requested retirement by letter dated November 6, 1919 (R. 10), and the court below held that the Secretary's order of November 12, 1919 (Order A) retired him from active service without a hearing. If this were true, section 1455 was not violated, as that section entitles an officer to a hearing before a retiring board "except in cases where he may be retired by the President at his own request." In other words, the sole purpose of section 1455 is to protect from arbitrary retirement an officer who does not desire retirement, and has nothing to do with a case of this kind in which the officer sought to be retired.

In its opinion the court below stated:

> The order of the Secretary retired plaintiff from active service, and the order of the Bureau of Navigation retired him from the service by general discharge. * * *
>
> It is clear under existing law that plaintiff, having made proper demand upon the Secretary, could not be retired from active service or discharged without a hearing before a retiring board. It follows, therefore, that the order of the Secretary, retiring plaintiff from active service, and the order of the Navigation Board made in pursuance thereof, discharging him, are void and without authority of law * * * it is equally clear from the provisions of section 1455, supra, that no officer can be retired from active service or discharged until a hearing before a retiring board has been accorded to him. (R. 50.)

The error in these statements, which were the basis of the court's decision, lies in the fact that, even conceding that the laws cited applied to the case of the defendant in error, *he was neither retired from active service nor discharged* by the Secretary's order or by the order of the Bureau of Navigation issued in execution thereof; but that said orders merely operated to return him to his normal status as a member of the Naval Reserve Force subject to subsequent recall to active duty or to retirement in accordance with the law during the remainder of his four-year term of enrollment.

The precise language used in the Secretary's order was that the defendant in error "be released from active duty." A military order directing that a member of the Naval Reserve Force "be released from active duty" is susceptible of but one interpretation, namely, that he is for the time being absolved from the obligation assumed by his enrollment which, in the language of the law (Act of August 29, 1916, supra), is to "serve in the Navy in time of war or during the existence of a national emergency as declared by the President." After the execution of such an order the reservist in whose case it has been issued continues until the expiration of his term of enrollment to enjoy all the rights, benefits, and privileges and to be subject to all the liabilities prescribed by law for members of the Naval Reserve Force. Whatever rights, benefits, and privileges, whether in respect of retirement, pay, rank, or honors, including the privilege of wearing the uniform of his rank, which were possessed under the law or regulations by

any other member of the Naval Reserve Force in his normal status as a member of that organization were likewise possessed by this officer after the Secretary's order had been executed. Specifically as to the matter of retirement the Secretary's order did not in any manner whatsoever deprive the defendant in error of any right or eligibility that he possessed prior to the issuance thereof to apply for retirement or to be retired on account of physical disability which may have been incurred by him while in active service.

It has been officially decided by the Navy Department, in its published decisions (Court-Martial Order No. 268, Aug. 30, 1919, pp. 15–16), that members of the Naval Reserve Force who are physically disabled in the line of duty while on active duty with the Navy in response to the call of the President are not deprived of their eligibility for retirement on account of such disability by being subsequently released from active duty; that the law makes no distinction with respect to retirement between members on active duty and those on the inactive list. In accordance with this official interpretation of the law certain members of the Naval Reserve Force otherwise eligible for retirement have in fact been retired, both before and since this proceeding was instituted, notwithstanding that they had in the meantime been released from active duty under orders identical with those issued in this case. Accordingly, it was expressly stated in the Secretary's answer upon this point (R. 39) "that if this petitioner has any right to retirement and its advantages the aforesaid order

and its enforcement does not deprive him of such right."

The Secretary's order, in its legal effect—and we are here concerned only with its legal effect—was humane in that it temporarily released from his obligation of performing active duty in the Navy an officer who had been reported by a board of medical survey to be physically unfit for duty, while at the same time it left his status unchanged in so far as concerned his eligibility for retirement. The Secretary's order was something wholly separate and apart from the matter of retirement. That it did not retire the defendant in error, as erroneously held by the court below, is sufficiently shown by the fact that the very basis of this proceeding was the complaint of the defendant in error that the Secretary's order deprived him of his right of retirement. If the order had the effect of retiring the defendant in error, this action would never have been brought. In the amended petition (R. 7) it is specifically averred:

> The defendant, as Secretary of the Navy, will, unless prevented by the court, cause the said order mentioned in paragraph 13 hereof to be enforced against the petitioner *and will deny and deprive him of retirement and its advantages.*

In other words, the court below holds that the Secretary's order should be revoked *because it illegally retired defendant in error;* while defendant in error contends that the Secretary's order should be revoked *because it illegally prevented his retirement*; while the

fact is that the order neither retired defendant in error nor prevented his retirement.

Neither did the Secretary's order "wholly retire" defendant in error from the service in violation of section 1455, R. S., as erroneously held by the court below. "Wholly retire" is synonymous with "discharge," but it carries with it certain benefits which are not incident to a discharge as ordinarily understood.

> What is it to be wholly retired from the service? It is nothing less than to be put out of the Army and out of office. (*Miller* v. *United States*, 19 Ct. Cls. 338, 353.)
>
> An officer on being wholly retired becomes a civilian. (*Miller* v. *United States*, 19 Ct. Cls. 338, 353.)
>
> If the statute should say "discharged" it would use a term applicable to enlisted men; if it should say "dismissed" it would use a term savoring of punishment and disgrace. The legislative draftsman therefore avoided these and used the curious euphemism "wholly retired." (*Emory* v. *United States*, 19 Ct. Cls. 254, 263.)

These citations from Melling's Laws Relating to the Navy sufficiently show that the orders issued in the present case did not "wholly retire" the defendant in error. He did not become a civilian by virtue thereof and has not been treated as such, but continued for the remainder of his enrollment to be a member of the Naval Reserve Force as

hereinbefore explained, the same as thousands of others who had been released from active duty.

The legal effect of the Bureau of Navigation's order *honorably discharging* the defendant in error *from active service in the Navy* was precisely what it was intended to be—that is, to release the defendant in error from active service in the Navy. The language of the Bureau of Navigation's order was not "honorably discharged from the Navy" or "honorably discharged from the Naval Reserve Force," but was "honorably discharged from *active service in the Navy.*" The language of the law (Act of August 29, 1916, 39 Stat. 588, 589) is:

> Enrolled members of the Naval Reserve Force may, in time of war or national emergency, be required to perform *active service in the Navy* throughout the war or until the national emergency ceases to exist.

The language of the Bureau of Navigation order followed the language of the statute. It discharged the defendant in error from "active service in the Navy," thereby restoring him for the remainder of his enrollment to his normal status as a member of the Naval Reserve Force, with all the rights, benefits, privileges, and liabilities incident to membership in that organization as hereinbefore recited in regard to the order of the Secretary. Neither the Secretary's order nor that issued by the Bureau of Navigation used the word "retired" or any word the legal equivalent thereof.

In his brief filed in the court below counsel for defendant in error vigorously attacked the legality of an order issued by the Secretary of the Navy under date of October 29, 1919, erroneously considering that order as having required that no disabled officers of the Naval Reserve Force should be retired, but that all such disabled officers should be "discharged without pay;" and in his brief he stated the question presented in this case to be, whether the Secretary of the Navy had the power in individual cases "to enforce that general order by personally discharging such officers from the Navy; and personally preventing their appearance before a retiring board."

The only provision in the order of October 29, 1919, which could possibly be construed as applying to defendant in error is as follows:

> 3. When the officer is an officer of the Naval Reserve Force or Marine Corps Reserve and is found by a board of medical survey to be unfit for further service, he shall be placed on inactive duty.

The effect of the order of October 29, 1919, as applied to any member of the Naval Reserve Force was precisely the same as that of the orders issued by the Secretary of the Navy and the Bureau of Navigation in the individual case of this defendant in error. In both instances members of the Naval Reserve Force were merely "released from active duty," "honorably discharged from active service in the Navy," or "placed on inactive duty," while

retaining during the remainder of their enrollment their normal status as members of the Naval Reserve Force not on active duty, but subject to recall to active duty, retirement, or discharge in accordance with law.

CONCLUSION.

Certainly the power has never been given the courts to annul military orders issued in the course of demobilization following cessation of hostilities in a war, by commanding the *Commander in Chief*, through his representative, the Secretary of the Navy, to cancel his orders releasing from active duty officers whose services are no longer required. Congress has never given such power to the courts, and it could not constitutionally do so, as the command of the Army and Navy is exclusively in the President, not subject to control by Congress or the courts.

JAMES M. BECK,
Solicitor General.

RUFUS S. DAY,
Special Assistant to the Attorney General.
Attorneys for Plaintiff in error.

GEORGE MELLING,
Attorney, Office of the Judge Advocate General, Navy Department, of Counsel.

APRIL, 1923.

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